89-08

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WILBURN GONCE and LARRY RILEY,
Petitioners

v.

VETERANS ADMINISTRATION,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

I. What are the limits, if any, of an arbitrator's discretion in interpreting a collective bargaining agreement? What, if anything, constitutes "plain language" in a collective bargaining agreement such that an arbitrator cannot ignore such language?

II. Will the doctrine of "collateral estoppel" be applied to give preclusive effect to "interpretations" of prior arbitrators when the "interpretations" are clearly inconsistent with subsequent "interpretations"?

III. Whether the record below was sufficient to determine whether or not the application of collateral estoppel was justified in the instant cases such that prior arbitration awards would preclude subsequent inconsistent awards.

IV. Whether the arbitration awards in Petitioners' cases were arbitrary, capricious, or unsupported by the evidence.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

NO. 88-3328,-3329

WILBURN GONCE and LARRY RILEY,
Petitioner

v.

VETERANS ADMINISTRATION
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Wilburn Gonce and Larry Riley, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this matter on April 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit, whose judgment is herein sought to be reviewed,

is unreported and is reprinted in the separate Appendix to this petition, page 1. The prior opinions of the Arbitrators are also reprinted in the Appendix, pages 21 and 38 respectively.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on April 13, 1989. A copy of the Court's Order is reprinted in the Appendix to this petition, page 1. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. Section 2154(1).

QUESTIONS PRESENTED

I. What are the limits, if any, of an arbitrator's discretion in interpreting a collective bargaining agreement? What, if anything, constitutes "plain language" in a collective bargaining agreement such that an arbitrator cannot ignore such language?

II. Will the doctrine of "collateral estoppel" be applied to give preclusive

effect to "interpretations" of prior arbitrators when the "interpretations" are clearly inconsistent with subsequent "interpretations"?

III. Whether the record below was sufficient to determine whether or not the application of collateral estoppel was justified in the instant cases such that prior arbitration awards would preclude subsequent inconsistent awards.

IV. Whether the arbitration awards in Petitioners' cases were arbitrary, capricious, or unsupported by the evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 5 U.S.C.A. Sections 7703(a)(1) and 7703(c) which provide as follows:

"(a) (1) Any employee ...adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the

order or decision."

"(c) In any case filed in the Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be--

(1) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;"

This case also involves 5 U.S.C.S. Section 7121(f) which provides as follows:

"In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall

apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board."

STATEMENT OF THE CASE

This is a consolidated appeal from arbitration proceedings dismissing the grievances of Wilburn Gonce and Larry Riley as not arbitrable.

A. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

Gonce and Riley were employed as members of the nursing staff of a locked psychiatric ward at the Veterans Administration Medical Center, Waco, Texas. In April and May of 1986, the Veterans Administration issued letters of proposed removal to approximately nineteen employees assigned to the nursing staff, primarily nursing assistants, on the locked ward. All affected employees were represented by A.F.G.E., Local 1822 and grieved the

proposed removals in May and June of 1986. Final decisions removing eleven of the employees were issued by the Agency on or before July 11, 1986. Pursuant to Article 14, Section 1, of the Master Agreement between the Veterans Administration and the American Federation of Government Employees (App-94), A.F.G.E.. Local 1822 referred all cases involving removal to regular arbitration. Notice to invoke arbitration in each case was timely made.

All proposed disciplinary action was based solely on time-lapsed videotapes, copies of which were not furnished to the Union representatives and affected employees, but the representatives and employees were allowed to view the tapes during the grievance process.

Beginning in September of 1986, the Union assisted affected employees in proceedings before the Texas Employment Commission seeking to recover unemployment

compensation. During the hearings before an appeals referee of the Commission, Union representatives and employees discovered that the Agency had videotapes which were significantly different from those previously viewed by the Union and the employees. When the Agency refused to make copies of the videotapes for the affected employees or for the Texas Employment Commission, A.F.G.E. Local 1822 filed a unfair labor practice complaint with the Federal Labor Relations Authority seeking to obtain copies of the original videotaped evidence maintained by the Agency.

In December 1986, the Regional Director of the FLRA determined, inter alia, that the charge of the Union was untimely filed. The Regional Director's decision was appealed in January of 1987, and affirmed in or about March of 1987.

On or about March 31, 1987, a new director was appointed to the VA Medical

Center in Waco, Texas. The director and the Union entered into settlement negotiations relative to all pending remoal cases. When settlement negotiations were unsuccessful, the Agency and the Union proceeded to arbitration on a case-by-case basis. The first employee to proceed to arbitration under the conventional arbitration procedures of the Master Agreement (Article 14, Section 2, App-94) was Jeanie Anderson. A list of arbitrators for her case was requested and furnished in May of 1987. Although the Master Agreement required the parties to select an arbitrator within ten (10) calendar days after receipt of such list, the parties, by agreement, extended the time limit on selection of the arbitrator until August of 1987, again attempting settlement. On September 11, 1987, the Agency informed the Union that it intended to raise the issue of "arbitrability" in the Anderson case,

claiming that the request for a list of arbitrators was untimely submitted.

On October 1, 1987, the case of Jeanie Anderson proceeded to arbitration, with the arbitrator being asked to decide both (1) the issue of arbitrability and (2) the merits of the case. On October 31, 1987, the arbitrator rendered a decision finding both issues in favor of the employee and reinstating the employee with full restitution. (App-46).

For a brief period of time thereafter, the Agency and the Union reattempted settlement of the remaining cases. When unsuccessful, and when the Agency advised the Union that it would again raise the issue of arbitrability, the Union requested a list of arbitrators for all remaining cases. On December 21, 1987, the Agency joined with the Union in requesting lists for each case.

The cases proceeded to arbitration on a

case-by-case basis. Lists of arbitrators were timely furnished; arbitrators were timely selected; and arbitration dates were set by the arbitrators as follows:

1. In re: Clovis Sutton, FMCS #86-00612, March 22, 1988.
2. In re: Melvin L. Gayle, FMCS #88-06827, March 28, 1988.
3. In re: Ernest B. Cashaw, FMCS #88-06827, April 14, 1988.
4. In re: Rudy Morales, FMCS #88-06607, April 19, 1988.
5. In re: Ted Basley, FMCS #88-06609, April 27, 1988.
6. In re: Wilburn Gonce, FMCS #88-06829, May 2, 1988.
7. In re: Larry Riley, FMCS #88-06824, May 20, 1988.
8. In re: Kirk West, FMCS #88-06611, May 23, 1988.

All cases proceeded to hearing before an arbitrator except the cases of Basley

and Riley. The Basley case was settled. The issue of arbitrability was decided in the Riley case without hearing, on the basis of briefs requested by the arbitrator. All arbitrators, except the arbitrators in the cases of Gonce and Riley, found that the cases were arbitrable. (The decisions of the arbitrators in Gonce and Riley cases are reprinted in the Appendix, pages 21 and 38 respectively.) Petitions for review in the cases of Gonce and Riley were timely filed with the Court of Appeals for the Federal Circuit on June 27, 1988. The cases were consolidated by order of the court on August 30, 1988. The decisions of the arbitrators were affirmed by the Court on April 13, 1989, with Senior Circuit Judge Nichols dissenting. (App-1)..

B. STATEMENT OF THE EVIDENCE.

This Petition for Writ of Certiorari applies to the issue of the arbitrability

of the cases of Petitioners Gonce and Riley and not to the merits of the cases. Therefore, the evidence specifically related to this petition involves (1) the sequencing of events as set forth in the preceding section, which evidence has been undisputed previously, (2) the terms of the Master Agreement, which in relevant part are reprinted in the Appendix beginning at page 94, and (3) the opinions of arbitrators which were rendered prior to the decisions of the arbitrators in the Gonce and Riley cases, i.e. the opinion of Arbitrator Schmedler in the case of Jeanie Anderson, which is reprinted in the Appendix beginning at page 46, the opinion of Arbitrator Woodward in the case of Melvin Gayle, which is reprinted in relevant part in the Appendix beginning at page 74, and the opinion of Arbitrator Harr in the case of Ernest Cashaw, which is reprinted in relevant part in the Appendix

beginning at page 89.

REASONS FOR GRANTING WRIT

I. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT DESPITE THE CLEAR AND OBIOUS INCONSISTENCY OF THE INTERPRETATIONS OF THE COLLECTIVE BARGAINING AGREEMENT, THE COURT NEED NOT GIVE PRECLUSIVE EFFECT TO THE INTERPRETATIONS OF PRIOR ARBITRATORS AND SHOULD INSTEAD ALLOW INCONSISTENT INTERPRETATIONS TO GOVERN EACH INDIVIDUAL CASE.

In its opinion, the Court of Appeals clearly acknowledges that the differences between the awards of prior arbitrators and the decisions of the Gonce and Riley arbitrators result from inconsistent interpretations of the Collective Bargaining Agreement. Specifically, the Court states:

> "The arbitrators here came to a conclusion about the meaning of the Collective Bargaining Agreement different from those who decided the issue earlier."

However, the Court's opinion goes on to state that the inconsistency "in and of itself is not any reason for us to question it."

In Connecticut Light & Power v. Local 420, International Brotherhood of Electrical Workers, 718 F.2d 14 (2d Cir. - 1983), the court stated that generally speaking it is only fair and reasonable to expect an arbitrator's decision to apply to subsequent cases unless it can be shown that (1) the previous decision was clearly an instance of bad judgment; (2) the decision was made without the benefit of some important and relevant facts or considerations; or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision. While not specifically so stating, it appears that the Court of Appeals determined that the reasoning of the prior arbitrators was "an instance of bad judgment" when compared to that of subsequent arbitrators and thus justifies its decision by stating:

"The Union's resort to other forms

> does not excuse its lack of diligence in these grievances. Simply put, it was the Union's responsibility to request the panel of arbitrators 'on or after the date of the notice of arbitration' so as to secure 'prompt and equitable resolution of grievances,' but it waited 17 months before it did. From all that appears nothing impeded the request. We agree with the arbitrators that there comes a time when the employer had a right to know whether a Union or employee intends seriously to prosecute a formal grievance, and there is no basis to overturn the conclusion that a 17-month delay is a violation of the Collective Bargaining Agreement." (Emphasis added.)

The Court, like the arbitrators, has incorrectly quoted the Collective Bargaining Agreement. The phrase "prompt and equitable settlement of grievances", quoted by the Court, appears in Article 13, Section 1, of the Bargaining Agreement; whereas, the phrase "on or after the date of the notice of arbitration", quoted by the Court, appears in Article 14, Section 2. Article 13 of the Collective Bargaining

Agreement details the "grievance" procedure; whereas, Article 14 details the "arbitration" procedure. The entire text of Article 13, Section 1, a portion of which is quoted by the Court, reads as follows:

> The purpose of this Article (i.e., Article 13) is to provide a mutually acceptable method for prompt and equitable settlement of grievances. This is the exclusive procedure for revolving grievances except as provided in Sections 2 and 3. (Emphasis added.)

Article 13, entitled "Grievance Procedure" does contain specific time limitations on each action to be taken throughout the grievance process. Article 13 ends by stating "If a decision is not issued in 45 days or if the grieving party is dissatisfied with the decision, the grieving party may proceed to arbitration in accordance with Article 14." (Emphasis added.) Article 14, Section 2, a portion

of which is quoted by the Court, provides that:

> On or after the date of the notice to invoke arbitration, the moving party will request the Federal Mediation and Conciliation Service to provide a list of seven (7) impartial persons to act as an arbitrator.

No time limitation is stated in this provision. Further, Article 14 contains no statement of purpose indicating that it is intended to effectuate "prompt and equitable resolution of grievances". The "prompt and equitable resolution" language is, by the terms of the agreement, applicable only to Article 13 and not to Article 14.

Negotiators of the Collective Bargaining Agreement did provide for "expedited arbitration" in Section 3 of Article 14, and in connection with that procedure and that procedure only, the agreement states that "Notwithstanding the

regular arbitration procedures of the agreement (i.e., Section 2), the following expedited arbitration procedure is hereby adopted to provide prompt and efficient handling of specified grievances" (emphasis added). There follows again specific time limits negotiated by the parties for resolution of specific types of grievances (Section 3.C.). The expedited arbitration procedure cannot be applied to grievances other than those specified in Section 3.C. "unless agreed to by the grievant."

In summary, the Court of Appeals has admitted that the decisions of the arbitrators in Gonce and Riley were inconsistent with the prior arbitration decisions; however, the Court has incorrectly held that under the circumstances the prior arbitration decisions should not be given preclusive effect over subsequent decisions.

II. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE COLLECTIVE BARGAINING AGREEMENT DID NOT REQUIRE THAT THE ARBITRATORS BE BOUND IN ANY WAY BY EARLIER AWARDS.

Article 14, Section 2.G. provides that:

> An arbitrator's award shall have only local application unless it was a national level grievance or the matter was elevated to the national level under procedures set forth below.

While this statement does not include the magic words "collateral estoppel", the provision clearly acknowledges that an arbitrator's award would be applied locally to govern the provisions of contract, even though the parties did mutually agree that an award would not have a binding effect on the national level unless the procedures spelled out in the agreement were followed.

III. THE COURT OF APPEALS ERRED IN FAILING TO LIMIT AN ARBITRATOR'S DESCRETION IN "INTERPRETING" A COLLECTIVE BARGAINING AGREEMENT PARTICULARLY WHEN THE "INTERPRETATION" OF THE AGREEMENT IGNORES THE PLAIN LANGUAGE OF THE AGREEMENT.

Although the court's have given to arbitrators wide latitude in interpreting and applying collective bargaining agreements, an arbitrator's discretion is no completely unbridled. As this Honorable Court has recently stated:

> "The arbitrator may not ignore the plain language of the contract." United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, at ___, 108 S. Ct. 364, at 371 (1987).

Both the omission and the inclusion of language may constitute "plain language" and the ommission of a contractual provision is just as significant as the inclusion of an express contractual agreement. An elementary principle of contract construction is that where a contract is silent as to a particular matter, an agreement in reference thereto cannot be interpolated. Phoenix Oil Company v. Mid-Continent Petroluem

Corporation, 177 Ok. 530, 60 P.2d 1054, 111 ALR 504. While it might arguably be acceptable for an arbitrator or a court to invoke the doctrine of "laches" (a defensive matter to be proved by the Agency, rather than the Union in this case), the arbitrators and the Court of Appeals are unjustified in rewriting the contract under the guise of "interpretation". The contract is not ambiguous as to whether or not a time limit was intended, it is simply silent with respect to any time limitation following the notice to invoke arbitration. It is clear that the parties contemplated time limits in other sections of the agreement; thus, the omission of such a limitation in this section is even more significant.

Another provision of the contract buttresses the Union's position that no specific time limitation can be imposed on

a grievant under this particular collective bargaining agreement without violating the express language of the agreement. Article 13, Section 4, of the agreement states that:

> The Agency must assert any claim of . . . non-arbitrability no later than the Step 3 decision. (emphasis added)

Step 3 is the last step in the Article 13 grievance process which precedes the arbitration process set forth in Article 14. Both the arbitrators in Petitioners' cases and the Court of Appeals totally disregarded the plain language of this provision. Perhaps neither of the arbitrators nor the court would have signed a collective bargaining agreement which included such language, but the Veterans Administration did. The grievances of both Petitioners were dismissed as "non-arbitrable"; the issues which formed the bases of these decisions were not

raised until well after Step 3 in the grievance procedure had been completed; and the so-called "interpretations" of the arbitrators simply cannot be reconciled with the plain meaning of the language contained in the contract.

In view of the fact that Article 14, Section 2, contains no specific time limit or statement of purpose relating to the "prompt" resolution of grievances, and in view of the fact that the contract expressly provides that no claim of non-arbitrability should be asserted after completion of the "grievance process" (i.e., Article 13), and in view of the fact that the language of Article 14, Section 2, is clear and unambiguous on its face, without indication that any particular "delay" could constitute a violation of this provision, the Court's majority opinion is erroneous. Instead, the

dissenting opinion correctly states the application of the contract and properly holds that "The arbitrators in the Gonce and Riley cases made an over-imaginative use of the Collective Bargaining Agreement."

The Court of Appeals also ignored another violation of the "plain language" provisions of the collective bargaining agreement when it affirmed the decision of the arbitrator in the Riley case. Article 14, Section 2 B. of the agreement provides that:

> The procedures used to conduct an arbitration hearing shall be determined by the arbitrator. Both parties shall be entitled to call and cross-examine witnesses before the arbitrator. (emphasis added)

The record below is clear that there was no hearing in the Riley case. Although a hearing date had been set for the Riley case and although the issues to be

presented included both the issue of arbitrability and the issue of the merits of the discharge, prior to hearing the Agency blatantly disregarded the provisions of the agreement, urging the arbitrator to deny Mr. Riley his rights to an arbitration hearing, and requesting that the arbitrator proceed to determine the issue of arbitrability based upon a submission of "briefs" by the Agency and the Union. Thereafter the arbitrator ordered the Union to submit a brief in response to the one previously submitted by the Agency; and the arbitrator proceeded to determine the issue of arbitrability without the presentation of evidence or cross-examination. While the agreement does provide that the "procedures used to conduct an arbitration hearing shall be determined by the arbitrator" (Article 14, Section 2.B., cited supra), the agreement also clearly

states in plain and mandatory language that "both parties shall be entitled to call and cross-examine witnesses before the arbitrator." (emphasis added)

IV. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE RECORD WAS INADEQUATE TO ASCERTAIN WHETHER OR NOT THE ISSUE PREVIOUSLY ADJUDICATED WAS IDENTICAL WITH THAT PRESENTED IN THE CASES OF GONCE AND RILEY.

V. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE DOCTRINE OF COLLATERAL ESTOPPEL CANNOT BE APPLIED IN THE INSTANT CASES BECAUSE THE AGENCY CONTENDED IN ARBITRATION PROCEEDINGS THAT THE QUESTIONS OF ARBITRABILITY PRESENTED IN THE GONCE AND RILEY CASES WERE DIFFERENT FROM THOSE PRESENTED IN AND ADDRESSED BY PRIOR ARBITRATORS (SPECIFICALLY IN THE PRIOR ARBITRATION OF THE CASES OF GAYLE AND CASHAW).

VI. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE AWARD IN THE RILEY CASE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

VII. THE COURT OF APPEALS HAS ERRED IN HOLDING THAT THE AWARD IN THE GONCE AND RILEY CASES WERE NOT ARBITRARY.

Although it might appear that the preclusive effect of prior arbitration awards is always a matter of individual

resolution absent a provision in the governing contract that requires earlier awards to bind subsequent arbitrators, it is permissible to apply collateral estoppel to labor arbitration decision in specified circumstances. See W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 764 (1983), Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222 (1985) but see also Kroeger v. United States Postal Service, 865 F.2d 235 (Fed. Cir. 1988).

In the instant case the Court of Appeals has refused to apply the doctrine of collateral estoppel, holding that the record is:

> "... unclear what the facts are. Though related, the actions taken against the VA employees were based on separate instances of alleged misconduct....there are no transcripts of the arbitration proceedings. Therefore, we cannot tell whether mitigating circumstances distinguish the cases."

The issue presented on appeal was not related to the merits of the termination action but was limited to the issue of whether or not delay in requesting a panel of arbitrators rendered the grievances of petitioners non-arbitrable. Therefore any possible differences in acts of misconduct simply should not be relevant to any issue presented on appeal.

The Veterans Administration, on appeal, has contended that there "might have been" differences in the evidence presented to the two arbitrators. The record from below does not substantiate such a contention. Specifically, in the Riley case, the Agency acknowledged that prior arbitrators (Cashaw and Gayle) had found that 18-month and 17-month delays were not unreasonable. The Agency did not distinguish the findings on the basis of facts presented to the arbitrators, but instead requested the Riley arbitrator to

disregard the fact findings because "we think their judgments were erroneous." (As noted previously, the Riley case was decided on the basis of briefs submitted in by the Agency and the Union. These briefs appeared of record in the court below.) The Agency did not distinguish the facts in the Riley case from the facts in Cashaw or Gayle; it merely urged the arbitrator to disregard the findings in those cases, submitting that "the reasoning and conclusions" of another arbitrator in a totally unrelated case (involving the and employee at the VA Regional Office in San Diego California) "were superior to the judgments of the arbitrator's cited by the union." The Agency did not and could not distinguish between the facts relating to arbitrability in the Riley case versus the facts relating to arbitrability in the Cashaw case.

The Court of Appeals stated that it

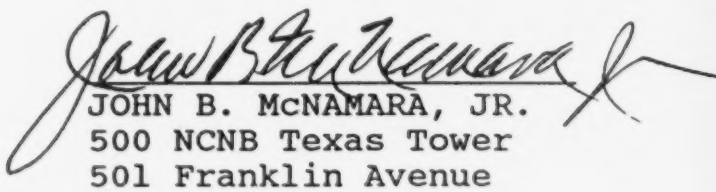
could not determine (1) whether collateral estoppel was justified in the instant cases and (2) whether there was substantial evidence to support the decisions of the arbitrators because there were no transcriptions of any of the arbitration proceedings in the record. The Court of Appeals was furnished with copies of the Briefs and the Statements of Fact incorporated therein that were submitted by both the Agency and the Union in the Gayle, Cashaw, Gonce and Riley cases. The Court of Appeals was also furnished with copies of the opinions of the arbitrators in the Anderson, Gayle, Cashaw, Gonce and Riley cases, which opinions included fact findings related to the issues submitted. There was no hearing in the Riley case; therefore there could be no record in that case other than the documents that were submitted to the arbitrator in written form and furnished to the court. Furthermore,

even though there was no transcription of testimony in the Gonce case, there was a certified list of documents in the Court of Appeals' file and copies of the documents listed therein were contained in Petitioners' Appendix filed with the court. (Petitioners' Appendix was 397 pages in length and is therefore not reprinted in toto in the Appendix to this Petition.) It is most apparent from the Briefs in each of the cases cited above that there were no disputes in the factual issues relating to the events that transpired between the time that arbitration was invoked in the summer of 1986 and the time that a panel of arbitrators was requested by the Union for all remaining grievants in December of 1987. The only difference between the positions of the Agency and the Union with respect to these events was whether or not the events justified the delay in requesting a panel of arbitrators. In

addition, of course, there was a dispute as to whether the contract could be interpreted to allow the Agency to challenge the arbitrability of the grievant's claims despite the delay.

CONCLUSION

WHEREFORE, Petitioners pray that a writ of certiorari be granted.



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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Petition for Writ of Certiorari have this 12th day of July been forwarded to all counsel of record.

John B. McNamara, Jr.